

A HABITAT CONSERVATION PLAN
TO ENCOURAGE THE VOLUNTARY RESTORATION AND ENHANCEMENT
OF HABITAT FOR THE RED-COCKADED WOODPECKER
ON PRIVATE AND CERTAIN OTHER LAND IN THE SANDHILLS REGION OF
NORTH CAROLINA BY PROVIDING "SAFE HARBOR" TO PARTICIPATING LANDOWNERS

I. Background

The Sandhills Region of North Carolina supports one of the largest remaining populations of federally endangered red-cockaded woodpeckers (RCWs) in the nation and is identified in the RCW recovery plan as 1 of the 15 populations across the species' range that must be viable to recover the species (population viability is defined in the 1985 RCW Recovery Plan and under Part 7 in this document). Unlike the other 14 recovery populations, however, a significant portion (approximately 30 percent) of the RCW groups known (a group is defined as a "family" unit consisting of one to nine birds) known are on private land and could potentially contribute to a Sandhills recovery population. Thus, the recovery of the RCW in the Sandhills is likely to be influenced significantly by the land management decisions of private landowners.

In September 1992 the U.S. Department of the Army, Fort Bragg Military Reservation (Fort Bragg), in coordination with the U.S. Fish and Wildlife Service (Service), hosted a conference specifically to address RCW protection needs on private land and to highlight the need for a coordinated multi-agency effort to protect this species on a population level in the Sandhills. A follow-up meeting was held in March 1993, and a working group was formed with representatives from the Service's Raleigh and Asheville Field Offices, Fort Bragg, North Carolina Wildlife Resources Commission, North Carolina Natural Heritage Program, North Carolina State University, and the Sandhills Area Land Trust. The group has met over the past 2 years to develop an overall conservation strategy for recovery of this population. A significant component of this conservation strategy is the development of a program under Section 10(a)(1)(B) of the Endangered Species Act (Act) that encourages voluntary enhancement and restoration of RCW habitat on private and certain other land in return for protection--a "safe harbor"--from any additional future liabilities under the Act.

The Service, through its RCW Recovery Coordinator, based in Clemson, South Carolina, and its Sandhills RCW Biologist, based in Southern Pines, North Carolina, will be the formal permittee under the requested Section 10(a)(1)(B) permit.

II. Purpose and Need

The purpose of this conservation plan is to encourage and facilitate the restoration and enhancement of nesting and foraging habitat for the RCW on privately owned and certain other land in

the Sandhills Region of North Carolina. There are a variety of actions that private landowners could take to provide suitable nesting or foraging habitat on their land. Such actions could result either in the use by RCWs of currently unused land parcels or in the use by greater numbers of RCW groups on land parcels currently used by at least one group. Not only do landowners have little legal or economic incentive to undertake such actions at present, they actually have, in some respects, a disincentive to do so. The use (or increased use) of a landowner's land by RCWs brings with it a responsibility to avoid harming an RCW and its habitat. These responsibilities, depending on the number of RCW groups involved and the landowner's tract size and land management or land use objectives, can sometimes limit or modify a landowner's land use alternatives. To minimize these responsibilities under the Act, private landowners have generally refrained from taking the types of actions that would benefit the RCW. Some landowners may in fact be taking actions designed to reduce the likelihood that their land will be used by RCWs in the future, such as prematurely harvesting timber, allowing hardwood midstory to encroach on open pine forests, eliminating potential future cavity trees, and destroying abandoned clusters (a cluster is defined as the aggregate of cavity trees [active and inactive] including a 200-foot buffer around the aggregate currently or formerly used by an RCW group).

Some Sandhills landowners may be willing to take or permit actions that would benefit the RCW on their property if the possibility of future land use limitations can be reduced or eliminated. Such actions could include midstory removal and control through prescribed burning or mechanical manipulations, installing new RCW nesting and roosting cavities, or improving abandoned cavities through the placement of restrictors, pine tree planting and thinning, wiregrass restoration, and other activities.

The primary objective of this conservation plan is to encourage voluntary RCW habitat restoration or enhancement activities by relieving a landowner who enters into a cooperative agreement with the Service from any additional liability under the Act beyond that which exists at the time the agreement is signed (these responsibilities, if any, are referred to in this document as "baseline" responsibilities). In other words, the objective is to give such landowners "safe harbor" from added liability. As long as a landowner carries out the agreed-upon habitat improvements and maintains his or her baseline habitat responsibilities (if any) on their property, they may develop, harvest trees upon, or make any other lawful use of the property, even if such use incidentally results in the loss of RCWs or their habitat. There are only two qualifications on this right. First, RCWs may not be shot, captured, or otherwise directly "taken." Second, a participating landowner who plans to carry out an action likely to result in the incidental taking of an RCW (i.e., an action that would not be permissible, except for this plan and agreement) can

do so only in the nonreproductive season unless otherwise authorized by the Service and must give the Service reasonable advance notice and an opportunity to translocate the birds in question if the Service chooses to do so.

Thus, participating landowners will be asked to sign cooperative agreements with the Service that will identify any existing RCW baseline responsibilities, specify any proposed habitat improvements, and record the general condition of the site (i.e., through maps, photos, and biological surveys). Cooperative agreements may be for varying periods of time, subject to a potential repayment obligation (discussed below) if Federal funds are involved, and shall be revocable by the landowner. A proposed cooperative agreement is included in Appendix 1. No incidental taking of any existing RCW group is contemplated or permitted under this plan except in the special circumstances described below (see the section entitled "Shifting RCW Baseline Responsibilities to New Groups").

To illustrate, take the hypothetical example of a landowner who, at the time of entering into a cooperative agreement hereunder, has no active RCW groups using his or her land (no RCWs known within one-half mile of the property). That landowner has no existing responsibility to provide either nesting or foraging habitat on the property and thus has an RCW baseline of zero. If, after carrying out the management practices agreed upon, an RCW group is established on the property, the landowner may, upon termination of the agreement, carry out any land use that results in the incidental taking of the group thus established without violating the Act. The RCW baseline for any participating landowner will be determined according to the Service's 1992 Draft RCW Procedures Manual for Private Lands (Manual) or any successor document that may be in effect at the time a landowner enters into a cooperative agreement under this plan. So long as a participating landowner's future land use practices maintain the RCW baseline established at the time the cooperative agreement was signed, any subsequent incidental taking of RCWs by the landowner will be authorized by the Section 10(a)(1)(B) (or Section 10(a)) permit granted hereunder (a participating landowner will only be subject to one set of guidelines during the life of the agreement--those in effect at the time the agreement is signed).

Participating private landowners who enter into cooperative agreements with the Service, as well as their successors in interest, will be included within the scope of the permit by Certificates of Inclusion. A proposed Certificate of Inclusion is included in Appendix 2. In order to give assurance that voluntary habitat improvements made by the landowner do not restrict present and subsequent owners, the proposed permit time period is 99 years.

III. Geographic Scope

The geographic scope of the conservation plan encompasses the Sandhills Region of North Carolina; it generally consists of a six-county area within the Sandhills that includes all or parts of Cumberland, Harnett, Hoke, Moore, Richmond, and Scotland Counties. Specifically, the plan area boundary includes land south of N.C. Highway 24/27 in Moore County; east of U.S. Highway 220 and north of U.S. Highway 74 in Richmond County; north of U.S. Highways 74 and 401 in Scotland County; north of U.S. Highway 401 in Hoke County; west of Interstate 95 in Cumberland County; and south of N.C. Highway 27 and west of U.S. Highway 401 in Harnett County (see map in Appendix 3). Within this specific plan area, land potentially eligible for inclusion in the conservation plan include all privately owned as well as non-Federal public land (e.g., Weymouth Woods State Nature Preserve), including land owned by counties, cities, and other governmental entities. In short, essentially all Sandhills area land other than Federal land and the North Carolina Wildlife Resources Commission's Sandhills Game Lands are potentially eligible for inclusion in the plan. Priority will be placed on securing cooperative agreements with landowners where the land has the potential to benefit the RCW, particularly land with abandoned clusters.

IV. Impacts Likely to Result from the Proposed Taking

Although incidental taking of RCWs is to be authorized as part of this conservation plan, it is important to note that such taking may or may not ever occur. The expectation underlying this conservation plan is that the management measures to be undertaken on participating land will result in the use of some or most of the land by RCWs and that without those measures such land will not otherwise be utilized by RCWs. While landowners will be permitted under this plan to carry out activities that could result in the incidental taking of RCWs on their land, they may choose not to do so at all or not to do so for many decades.

Because the landowner agreements contemplated for the program are of limited duration and are revocable by the participating landowners, the program's benefits for the RCW may appear quite transitory. However, the favorable habitat conditions created through the program will not necessarily cease to exist upon expiration or termination of the individual agreements. Those conditions may persist for many years thereafter, unless the affected landowner elects to eliminate them. If the program continues for an extended period of time (e.g., for 99 years), with new land parcels constantly coming under agreement as agreements covering other land parcels expire, the net effect will be a shifting matrix of land being managed for RCW conservation, with a net beneficial impact upon the status quo.

Even if all the landowners who participate in the program eventually drop out, their obligation to maintain RCW baseline responsibilities will mean, at the very least, a return to the same circumstances that would have existed without the plan. Even in this worst-case scenario, the program will have provided significant interim benefits in the form of population and demographic maintenance during its duration. Such benefits would include temporarily halting or reversing the fragmentation of overall RCW habitat, creating or strengthening dispersal corridors between subpopulations, contributing some offspring that may either reoccupy previously abandoned clusters or that may be used for relocation to land protected by longer-term conservation arrangements and providing a form of "insurance" against the possibility of a disastrous event that could significantly reduce the number of RCWs on public land in the Sandhills. In short, it will have provided a hiatus in the long-term decline of the Sandhills RCW population and thereby will have "bought time" for other conservation strategies to be tested or implemented.

V. Measures to Monitor, Minimize, and Mitigate Negative Impacts

All participating landowners will sign cooperative agreements with the Service. Such agreements will include a description of the property to which the agreement applies and an explanation of the landowner's RCW baseline responsibilities toward RCWs on or near the property. The agreement will also briefly describe the actions that the landowner commits to take (or will allow to be taken) to improve RCW habitat on the property and the time period within which those actions will be taken and maintained. The agreement will also grant to the Service (and/or their designee) the right to enter onto the property for the purpose of ascertaining compliance with the agreement and for censusing; banding; and, in certain circumstances, translocating RCWs. In return for the landowner's commitments, the agreement will extend to the landowner the benefit and protection of "safe harbor" through a "certificate of inclusion" under the Section 10(a)(1)(B) permit issued to the Service.

The certificate of inclusion extends to the participating landowner the right under the Section 10(a)(1)(B) permit to incidentally take (i.e., take that is incidental to otherwise lawful activities or that is inadvertent) RCWs on the described property, so long as the RCW baseline responsibilities applicable to the property and clearly stated in the cooperative agreement, are maintained. Subject to maintenance of RCW baseline responsibilities, a participating landowner may, after the period when the agreement is no longer in effect (except during the RCW reproductive season from March to August, unless otherwise authorized by the Service), remove trees as part of a timber harvest operation or a conversion to nonforest use, where such tree removal is expected to result in the loss of an active cluster(s) on the described land, provided only that the Service

be notified 60 days in advance of such tree removal and given the opportunity to capture and relocate any affected RCWs.

The above restriction against tree removal during the breeding season is intended to minimize the impact of the authorized incidental taking by eliminating the possibility that reproductive efforts will be disrupted and nestlings destroyed. Additionally, the participating landowner's duty to notify the Service in advance of activities likely to result in the loss of active clusters and the Service's right to capture and relocate the affected birds are also intended to mitigate the impact of the authorized incidental taking. The relocation of female and subadult male RCWs has been shown to be feasible and effective. The relocation of breeding pairs has not been successful.

In assessing the impact of the authorized incidental taking, it is important to emphasize that the only RCW habitat that will be authorized to be eliminated is habitat that would almost certainly not be utilized by RCWs but for the voluntary participation by the landowner in the "safe harbor" program described here. Unlike many other habitat conservation plans, where some loss of existing habitat is authorized in return for the protection of other existing habitat, here, no loss of existing RCW groups; i.e., occupied habitat, is to be permitted as part of this plan. The only habitat that may be lost in the future is habitat that is currently unused (or unused at the time a landowner signs a cooperative agreement) and that is not expected to be used, except for this plan (however, see the discussion below in the section entitled "Shifting RCW Baseline Responsibilities to New Groups"). Thus, the net impact of the incidental taking authorized under this plan is, at the very least, a return to the status quo ante. The more likely net impact is an improvement over the current situation in terms of the number of RCW groups and the total area of suitable, actively managed nesting and foraging habitat in the Sandhills.

Monitoring of incidental take and implementation of the program will generally be accomplished in a number of ways. As noted above, the cooperative agreements signed by participating landowners will grant to the Service the right to enter onto the property for the purpose of ascertaining compliance with the agreement. The RCW population in the Sandhills is the most well-studied of any RCW population, with significant, longstanding monitoring and research efforts by Fort Bragg, North Carolina State University, and others. The location and status of most RCW clusters in the Sandhills are already known and have been monitored for many years. These established efforts provide a significant source of information about the location and status of RCW groups throughout the Sandhills and thereby provide a means of periodically assessing the effect of the program on a population level.

VI. Funding

At present, there are no funds specially earmarked for the implementation of this conservation plan. The absence of such funds may limit the size and scope of the plan. However, it will not preclude the implementation of this conservation plan for the following reasons: (1) the Service's RCW Coordinator and Sandhills RCW Recovery Coordinator, with existing funds, will contact landowners to determine whether there is interest in the program and will be responsible for monitoring compliance of any cooperative agreements signed with landowners; (2) some landowners may be willing to enter the program without funding assistance; and (3) there are several existing funding opportunities to assist landowners. These options are further detailed below.

It is anticipated that at least some landowners will be willing to assume the costs of carrying out the management measures to be required by cooperative agreements. In particular, this is likely to be the case where the management measures involved are not expensive, such as the installation of artificial cavities or cavity restrictors. To ensure that landowners are, in fact, able and likely to bear such costs, the Service will, at the time of entering into a cooperative agreement, advise the landowner of the likely cost of the management activities to be required and inquire as to the landowner's ability to incur those costs.

In other situations, landowners may be willing to participate only if part or all of the management costs are paid for by others. This may be the case where the costs of the management measures are more substantial, such as when significant hardwood midstory is to be removed. Funding from at least two existing sources may be available for such landowners. One source is the Service's own Partners for Wildlife program, through which cost-sharing assistance is available to carry out habitat and other wildlife improvements on private land. A second potential program is the U.S. Forest Service's Forest Stewardship Incentives program. This program, available to nonindustrial private forest landowners with less than 1,000 acres (up to 5,000 acres in certain circumstances), provides cost-sharing assistance for management actions described in forest stewardship plans. Conserving endangered species is one of the purposes for such plans. Under both of these programs, participating landowners are typically required to maintain the agreed-upon actions for 10 years and are required to repay the government its costs in the event they fail to do so. Should funds be available specifically for the "Safe Harbor" program, the Service would impose repayment obligations comparable to those of the Partners for Wildlife and Forest Stewardship Incentives programs in the event of noncompliance by participating landowners.

Finally, other financial incentives are available through private organizations (e.g., The Nature Conservancy's Longleaf Pine

Initiative) and local land trusts (e.g., the Sandhills Area Land Trust) which can purchase conservation easements for exceptional habitat. These private organizations and several state agencies (e.g., the North Carolina Forest Service and North Carolina Wildlife Resources Commission) and Federal agencies (e.g., Fort Bragg) may also provide either funding or management assistance (e.g., assistance with prescribed burning).

VII. Unforeseen Circumstances

This section addresses three hypothetical situations that, though unlikely, could occur. There could be (1) a major loss of RCWs on public land in the Sandhills as a result of a catastrophic event; (2) a redistribution of RCW groups in the Sandhills without any net increase in the number of those groups; and (3) a loss of groups upon which a participating landowner's RCW baseline responsibilities were calculated. Finally, this section addresses how RCW groups that are established as a result of this program will be counted toward the recovery objectives for the Sandhills RCW population.

A. Major Loss of RCWs on Public Land in the Sandhills

The assumption underlying this conservation plan is that the plan will provide significant benefits to the RCW in the Sandhills, even though on any given parcel of land those benefits may not be permanent or even long term. The expectation is that, even with this program, the bulk of the Sandhills RCW population will remain on public land, specifically on Fort Bragg. It is conceivable, though unlikely, that as a result of a disastrous event (e.g., Hurricane Hugo's impact on RCWs at the Francis Marion National Forest in South Carolina), RCWs on Fort Bragg could be so significantly reduced in numbers that the RCWs found on private land would become far more important to the future of the population than they had been previously.

If a situation such as that described above were to arise, the terms of the permit and conservation plan would preclude the imposition upon participating landowners of a duty to maintain habitat beyond their RCW baseline responsibilities. It would be the Service's responsibility, in such circumstances, to use other means of ensuring the conservation of the RCW, which may include acquisition of conservation easements or fee title interests and the renegotiation of cooperative agreements so as to give additional protection to the RCWs on the participating land. This is consistent with the Service's recently announced "No Surprises" policy with respect to habitat conservation plans. Moreover, it should be recognized that without the conservation plan described here, the consequences of the hypothesized disastrous event would be even more dire for the RCW in the Sandhills. Indeed, without

the conservation plan, the pool of additional RCWs this program is expected to create would not exist.

B. Redistribution of Existing RCW Groups without Net Gain

Although the purpose and expectation of this program is to increase the number of RCW groups in the Sandhills, it is conceivable that it will simply redistribute existing groups in a new configuration (e.g., with fewer birds on relatively well-protected public land and more birds on private land where they have no assurance of long-term protection, or a redistribution of baseline RCW groups on private land). This could occur if the habitat restoration undertaken as part of the program were to induce birds in existing clusters located in nearby degraded habitat to abandon those clusters and relocate to the newly restored habitat.

While this possibility cannot be dismissed altogether, there are ways to reduce its likelihood. Prior to entering into a cooperative agreement with any landowner, the Service can assess the likelihood that cluster restoration on that landowner's land will lead to abandonment of a nearby existing cluster on private or public land. Where that risk appears substantial, the Service can refrain from entering into the agreement (or enter into the agreement only if it is long term or if the neighbor[s] also agree[s] to participate). Where the nearby existing cluster is on the landowner's own land, the Service should ordinarily seek to include in the cooperative agreement the landowner's commitment to habitat improvement measures that will ensure that the existing cluster is not abandoned. If, despite efforts to ensure that the effect of the program is a net increase in active clusters, the Service determines that the program is redistributing existing birds without any net benefit to the population as a whole, it can cease entering into any additional cooperative agreements.

C. Loss of RCW Baseline Groups

As noted above, the right of a participating landowner to take RCWs incidentally under this program is contingent upon their maintaining certain baseline responsibilities established at the time the cooperative agreement is signed. Those responsibilities will be clearly expressed in the cooperative agreement (e.g., maintaining some minimal pine basal area of foraging habitat for active clusters located within one half-mile of their property). For landowners with existing baseline responsibilities, the cooperative agreement negotiated with the Service will address not only enhancing and restoring habitat for other RCWs but also sustaining existing RCWs. In spite of management and protection efforts, there may be circumstances, through no fault of the landowner,

where one or more of the active groups that gave rise to the landowner's RCW baseline responsibilities ceases to exist after the landowner signs a cooperative agreement. If the landowner decides to reduce his or her baseline responsibilities, the Service would not require the landowner to maintain habitat (either nesting or foraging) for an RCW group that no longer exists. Thus, whenever the Service learns that a formerly active cluster, upon which part or all of a participating landowner's RCW baseline responsibilities were premised, is no longer active, it shall advise the landowner in writing of that fact and furnish him or her with a revised assessment of the RCW baseline responsibilities. The determination that any such cluster is inactive shall be the sole responsibility of the Service and shall be based upon sufficient investigation by the Service to ascertain that no RCWs are occupying the cluster site or are likely to do so in the near future.

Ordinarily, a landowner's RCW baseline responsibilities will be associated with specific RCW groups in existence at the time they entered into the cooperative agreement. In certain limited circumstances, however, participating landowners may, with the consent of the Service, shift their RCW baseline responsibilities to a new group that was formed on their property subsequent to the cooperative agreement. This issue is discussed at greater length in Part 9, below.

D. Meeting the Recovery Objective for the Sandhills Population

In the Sandhills, the Service expects Fort Bragg, to carry the primary burden in recovering the RCW since it has the largest Sandhills RCW subpopulation, has a significant land base with suitable RCW habitat, and is the only Federal landowner within this recovery population that has the additional responsibility under Section 7(a)(1) of the Act to assist in endangered species conservation. The Sandhills Game Lands, managed by the North Carolina Wildlife Resources Commission is also a significant player in RCW recovery in the Sandhills. However, the present RCW distribution and potentially suitable habitat are fragmented, and the Service believes that Fort Bragg and the Sandhills Game Lands (along with adjacent Camp Mackall) are functioning as two separate RCW subpopulations. Until private land between these public landholdings is in long-term protection, the Sandhills Game Land will be counted as a separate, supporting subpopulation.

The above discussion invites the question of how, if at all, birds established on private land pursuant to this program should be counted toward the Sandhills RCW recovery objective. This question is important for two reasons. First, under the RCW recovery plan, downlisting and delisting of the RCW can occur when viable populations of RCWs are established at 6 to

15 of the locations referenced in the plan, respectively. Second, even without downlisting or delisting, establishment of a viable population of RCWs in the Sandhills would relax Section 7 requirements for Federal actions affecting birds in this population.

The 1985 RCW Recovery Plan specifies a minimum viable population size of 250 groups. The Recovery Plan is unclear as to whether this number refers to the total number of groups or the number of breeding pairs. Personal communication with the preparers of the Recovery Plan (M. Lennartz and G. Henry) have confirmed that 250 breeding pairs was intended to represent a reproducing population. According to the best information available, based on data collected in the North Carolina Sandhills subpopulations, between 310 and 390 potential breeding groups are required to meet the viability threshold of 250 successfully reproducing groups (Reed et al. 1993). The Service has required, in the absence of population-specific nesting data and following the intent of the recovery plan, that 400 potential breeding pairs be used as the standard to achieve 250 reproducing groups. Additionally, because up to 25 percent of groups may contain single birds (usually males), most RCW biologists have agreed, and the Service concurs, that viable populations should contain 500 active clusters (Southeast Negotiation Network 1990). Stevens (in press) recommends that, until more realistic spatially explicit models which incorporate the key social and ecological characteristics of the RCW are developed, 250 breeding groups should be considered a minimum. Populations will be considered viable when they satisfy the above thresholds over a 5-year period, without artificial cavities.

Because participating landowners are free at the termination of their cooperative agreements to eliminate the nesting or foraging habitat they have restored or enhanced, RCWs occupying that habitat have no assurance of long-term protection. For that reason, the Service proposes to count toward the above recovery goal any active RCW clusters on land enrolled in this program where (1) all necessary foraging and nesting habitat is protected on such land through a permanent agreement, (2) the cluster is not demographically isolated, and (3) such agreement runs with the land.

VIII. Alternative Actions Considered That Would Not Result in Take

The program described here authorizes the future incidental taking of RCWs on land that is currently unoccupied by RCWs and that is not expected to be occupied in the absence of this plan. No incidental taking of any existing groups of RCWs is contemplated or permitted under this plan (except as described in the section below entitled "Shifting RCW Baseline Responsibilities to New

Groups"). It is anticipated that the maximum number of groups that can be incidentally taken in the future will be no more than the number created through this program. In the Sandhills there are approximately 150 inactive RCW clusters on private and other land (other than Fort Bragg and the Sandhills Game Lands), most of which are potentially restorable and, if restored, and subsequently occupied by RCWs, could be incidentally taken at some point in the future with this program. Even considering the fact that new RCW clusters could be established, inhabited by RCWs, and then incidentally taken, it is still very likely that significantly less than 150 groups will be incidentally taken over the permit period.

The only way to prevent any incidental taking, whether on currently used or unused land is to either continue the status quo (i.e., not create this program), or subject participating landowners to the same legal responsibilities with respect to RCWs using their land as a result of this program as they have with respect to RCWs generally. If there were a significant number of landowners willing to restore or enhance habitat for RCWs in the Sandhills regardless of the legal consequences, one would expect to see such restoration and enhancement under way now, and there would be no need for this program. Clearly, however, that is not the case.

The purpose of this program is to reach exactly those landowners whose land management practices could benefit the RCW but who are unwilling to carry out those practices because of concerns about the legal consequences. In order to persuade such landowners to carry out those practices, they will need either a financial or regulatory incentive to do so. The alternative of paying landowners for desired management practices could be accomplished without allowing any incidental taking. The cost of such a program is likely to be commensurate with the cost of a program to acquire conservation easements in the Sandhills. The Service is unable at present to fund such a program. Instead, the regulatory incentive proposed here, though it authorizes future incidental taking, is expected to attract sufficient interest among Sandhills landowners to generate real benefits for the RCW.

IX. Additional Measures

As discussed above, participating landowners will be authorized to incidentally take RCWs by eliminating nesting or foraging habitat on their land, so long as such landowners maintain the RCW baseline responsibilities determined at the time they enter into a cooperative agreement. This section first addresses the issue of neighboring landowners and successors in interest describing how the proposed program will affect them. That is followed by a related discussion of the possibility for some participating landowners to shift their RCW baseline responsibilities from one group to another. The section concludes with a discussion of the

treatment of other listed or candidate species that may occur on participating land.

A. Neighboring Landowners and Successors in Interest

The clear purpose of the program is to encourage beneficial action by landowners who are willing to voluntarily carry out actions that are not required of them by law and that are expected to result in the use of their land by RCWs that would not otherwise use it. To achieve this purpose, it is necessary not only to relieve the landowner from certain land use limitations but also to extend this relief to his successors in interest as well. Otherwise, participating landowners, in order to ensure that the land was unencumbered by RCW-based land use limitations in the event of their death or sale of the property to another owner, would have an incentive to eliminate the habitat they had restored or enhanced prior to transferring the land. In order to increase the likelihood that participating landowners will continue to manage their land to benefit the RCW, the Certificate of Inclusion will be extended to both the participating landowner and to the successors in interest. Upon transfer of the property to another owner, the Service will attempt to contact the new owner, explain the baseline RCW responsibilities applicable to the property, and seek to interest the new owner in signing a new cooperative agreement to benefit the RCW on the property.

The permit and certificate of inclusion extends to successors and assigns the same right to incidentally take RCWs (and associated nesting and foraging habitat) that the original landowner had upon termination of the agreement. The sale or transfer of the property terminates the agreement. The successors and assigns are in the same position that the original owner would have been in had he or she retained the property and terminated the agreement.

A related issue pertains to neighboring landowners. Under the Service's Private Lands Manual (Manual), the presence of an RCW group on a parcel of land gives rise to two principal responsibilities. First, within the cluster itself, there are restrictions on the removal of active and inactive cavity trees and the number of other pines. Second, the Service's Manual specifies the amount and quality of foraging habitat that should be maintained within a one-half-mile radius of the center of the cluster. Where the one-half-mile radius encompasses more than one land parcel, the general rule is that the responsibility to maintain foraging habitat is apportioned among landowners within the circle according to their proportions of actual foraging habitat.

If, as a result of the activities to be encouraged by this program, RCW groups are established on participating land, the routine application of the Manual could impose limitations on neighboring landowners with regard to land use activities, such as timber harvesting, particularly within foraging habitat. Unless those neighboring landowners enjoy the same relief from future liability that the participating landowner enjoys, some landowners may not be willing to carry out habitat improvements on their own land that would effectively burden their neighbors. Even where a landowner is willing to take action that could burden the neighbors, considerations of fairness would seem to dictate that neighboring landowners not be held to land use limitations while the participating landowner is absolved of them.

The Manual acknowledges that a single set of rules applicable to all situations involving multiple land ownerships is unworkable and that the above general guidelines regarding sharing of responsibility are intended to address most, but not all, situations. Given the purpose and nature of the program to be initiated here, a different set of requirements is needed for this habitat conservation plan and its participants. Therefore, the Service will, with respect to any RCW group established on a participating landowner's land subsequent to the time a cooperative agreement with the landowner takes effect, permit any action by the participating landowner or other landowners within a one-half-mile radius that reduces available foraging or nesting habitat for that particular cluster below levels otherwise recommended. Only participating landowners will be required to give the Service prior notice of such actions and the opportunity to capture and relocate affected RCWs. Where one or more cavities are excavated by RCWs in trees located on the property of an adjoining landowner, the Service will attempt to inform the adjoining landowner of that fact and will require that prior to taking any action that incidentally removes that tree, the Service be notified and given an opportunity to salvage any affected RCWs. Further, such incidental taking of an active cavity tree may only be permitted during the nonreproductive season.

Because of the potentially large number of landowners within each one-half-mile radius foraging circle, the Service will not extend Certificates of Inclusion to such landowners. However, the Service will, in promoting and describing this program, seek to make clear that, except in the very limited manner noted above, neighboring landowners will not be affected by a landowner's decision to participate in the program.

B. Shifting RCW Baseline Responsibilities to New Groups

Ordinarily, landowner's RCW baseline responsibilities attach to specific RCW groups in existence at the time they enter into a cooperative agreement. In certain limited circumstances, however, participating landowners may, with the consent of the Service, shift their RCW baseline responsibilities to a new group that was formed on their property subsequent to the cooperative agreement. Specifically, when a new group is formed on a participating landowner's land after they have entered into a cooperative agreement and where the landowner agrees to provide all the nesting and foraging habitat needed for that group, that new group may replace any other group of similar status (i.e., breeding pair, single male, etc.) that was within the landowner's original RCW baseline responsibility. As a practical matter, this situation will apply only to landowners with at least 60 acres (and, more typically, several hundred acres) of suitable pine habitat.

The above possibility can be illustrated with the following example. A landowner with a 1,000-acre parcel has one RCW group (composed of a breeding pair) on his property at the time he enters into a cooperative agreement and he provides all the nesting and foraging habitat needed for that group. The baseline RCW responsibilities, therefore, are to maintain that group and its associated foraging habitat on the property. If, as a result of his participation in the program, a second breeding pair is established on the property for which the landowner provides all needed nesting and foraging habitat, the landowner may, with Service concurrence, switch the RCW baseline responsibilities from the first group to the new group. This flexibility may be to the landowner's advantage if, for example, he wants to develop the portion of the property where the original group occurred. The reason for requiring the landowner to maintain all the habitat needed for the new group is that, as described above, neighboring landowners are not required to maintain habitat for groups established pursuant to this program. Thus, without this requirement, the result might be that two groups would exist, neither of which would have sufficient foraging habitat. The reason for requiring the Service's concurrence prior to a landowner's shifting his or her RCW baseline requirements from one group to another is that there may be circumstances in which maintenance of the preexisting cluster is necessary in order to maintain contiguity of habitat, dispersal habitat, or other desirable features of the landscape or population. When a landowner receives the Service's concurrence to transfer his or her RCW baseline responsibilities, the Service will provide the landowner with a written statement describing the revised baseline responsibilities.

C. Other Listed and Candidate Species; Contribution to Protection of the Longleaf Pine Ecosystem

The conservation plan described here is aimed at encouraging habitat restoration and enhancement for the RCW. The permit sought for this plan will authorize the incidental taking of RCWs through future actions that eliminate or diminish the habitat restored or enhanced under this plan. No authority to take other federally listed endangered or threatened animal species is to be conferred by this permit.

The possibility exists that the following listed or Federal candidate species associated with longleaf pine and related habitats may occur on some of the land that might be considered for participation in this conservation plan:

BIRDS

Bachman's sparrow (Aimophila aestivalis) - Candidate

REPTILES

Northern pine snake (Pituophis melanoleucus melanoleucus) - Candidate

Southern hognose snake (Heterodon simus simus) - Candidate

Mimic glass lizard (Ophisaurus mimicus) - Candidate

AMPHIBIANS

Carolina crawfish frog (Rana aerolata capito) - Candidate

INSECTS

St. Francis's satyr (Neonympha mittelli francisci) - Endangered

Sandhills clubtail dragonfly (Gomphus parvidens carolinus) - Candidate

Arogo skipper (Atrytone arogos arogos) - Candidate

PLANTS

Rough-leaved loosestrife (Lysimachia asperulaefolia) - Endangered

American chaffseed (Schwalbea americana) - Endangered

Michaux's sumac (Rhus michauxii) - Endangered

Savanna leadplant (Amorpha georgiana var. confusa) - Candidate

Georgia leadplant (Amorpha georgiana var. georgiana) - Candidate

Sandhills milkvetch (Astragalus michauxii) - Candidate

Well's pixie-moss (Pyxidanthra barbulata var. brevifolia) - Candidate

Savanna cowbane (Oxypolis ternata) - Candidate

Savanna campylopus (Campylopus carolinae) - Candidate

Carolina asphodel (Tofieldia glabra) - Candidate

Eulophia (Pteroglossaspis ecristata) - Candidate

Sun-facing coneflower (Rudbeckia heliopsidis) - Candidate

Carolina goldenrod (Solidago pulchra) - Candidate

Spring-flowering goldenrod (Solidago verna) - Candidate
Pickering's daisy (Stylisma pickeringii var.
pickeringii) - Candidate

The elimination or diminution of the restored or enhanced habitat may affect the above-mentioned species. For that reason, the Service will, prior to entering into a cooperative agreement with respect to any land parcel, ascertain whether other listed or candidate species are likely to be present on the parcel by consulting available records. If suitable habitat exists, the Service will inspect the property. Where other such species are likely to be present, the Service will include such measures in the cooperative agreement for that land parcel as are necessary to ensure that no jeopardy to the survival of any federally listed plant or animal species results from the activities authorized under the agreement. The Service will complete an intra-Service Section 7 consultation for each such agreement where such species occur that will tier into the biological opinion prepared for the overall program. The Service will include any reasonable and prudent measures in the cooperative agreement deemed necessary to minimize the incidental taking of any listed animal species that occur on the subject property. If federally listed and/or candidate plant species occur on the parcel, the Service will encourage the landowner to consider measures that will aid in the conservation of those species. If the participating landowner agrees to implement the recommended measures for any candidate species, he or she will be protected from any further restrictions or obligations under the Act, if the species is federally listed as endangered or threatened in the future. This is supportive of the Service's "No Surprises" policy.

The Service believes it is likely that the program will result in net benefits to many of the above-mentioned listed and candidate species associated with longleaf pine habitats. Indeed, management activities such as prescribed burning will enhance habitat for most of the above-mentioned plant species.

APPENDIX 1

RED-COCKADED WOODPECKER HABITAT IMPROVEMENT COOPERATIVE AGREEMENT

This Agreement, dated _____, between the U.S. Fish and Wildlife Service (the Service) and [name of cooperator] (the cooperator), pursuant to authority conferred by Permit No. 798839, issued pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973, 16 U.S.C. 1539(a)(1)(B), is entered into in order to improve habitat for the red-cockaded woodpecker (RCW) on land owned by the cooperator.

The cooperator agrees to undertake [or allow the Service or its designees to undertake] and maintain, for the duration of this agreement, the habitat improvements described in the attached document on the cooperator's property indicated on the attached map (the property). The cooperator further agrees to permit the Service or its designees to enter onto the property at reasonable times to [undertake the agreed upon habitat improvements,] ascertain compliance with this agreement; band and census RCWs on the property; and, in certain circumstances, translocate RCWs from impending harm.

In consideration of the foregoing, the Service has issued to the cooperator a "Certificate of Inclusion" under Permit No. 798839. Such certificate authorizes the cooperator, or his or her successors and assigns, upon termination of this agreement, to carry out any activity on the property that will or may result in the incidental taking of RCWs or their habitat, subject to the following conditions: (1) the agreed-upon habitat improvements have been carried out; (2) the cooperator agrees to maintain [here describe applicable RCW baseline responsibilities]; (3) the activities expected to result in the incidental taking of RCW clusters may be carried out only during the nonreproductive season (September to February); and (4) not less than [60] days prior to commencing any such activity, the cooperator or his or her successors and assigns shall notify the Service and provide the Service with the opportunity to translocate any RCWs, if deemed necessary.

This agreement shall be in effect until its expiration on date and may be amended at any time by mutual agreement of the parties. Notwithstanding the foregoing, the agreement may be terminated by the cooperator by giving 30 days advance written notice to the Service. Such termination shall not affect the cooperator's rights under the Certificate of Inclusion, provided that the agreed upon habitat improvements have been carried out. In the event of the cooperator's termination of this agreement prior to its expiration date, the cooperator agrees to return to the Service any sums expended by it or paid by it to the cooperator to carry out the habitat improvements.

The cooperator guarantees that he/she is the owner of the property and warrants that there are no outstanding rights that will interfere with the Service's rights under this agreement. In the event the cooperator transfers part or all of the property, he or she shall inform the Service

and shall take such steps as are necessary to inform the purchaser of the existence of this agreement.

The Service assumes no jurisdiction or obligation over the property for the purpose of controlling trespass, controlling or eradicating noxious weeds, granting rights-of-way, and other incidents of ownership.

At the expiration or termination of this agreement, the cooperator assumes full and complete responsibility for all habitat improvements on the property made during this agreement. The Service shall have no obligation under this agreement after it has been terminated.

The cooperator will be responsible for securing any necessary permits incidental to the work to be completed. The Service and/or its designee will be responsible for securing any permits (e.g., Section 10(a)(1)(A) research permit) prior to activities such as monitoring nestlings, banding, and translocating RCWs. The Service is prohibited by law from obligations that exceed available funds; therefore, the Service can do only that work which is funded. In the event funds are not available to the Service to do the habitat improvements, the Service will advise the cooperator accordingly.

Field Representative and Title
U.S. Fish and Wildlife Service

Cooperator(s)

APPENDIX 2

CERTIFICATE OF INCLUSION

This certifies that the current and future owners of the following property [describe] are included within the scope of Permit No. 798839, issued on [date] for a period of [99] years to the U.S. Fish and Wildlife Service (the Service) under the authority of Section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1539(a)(1)(B). Such permit authorizes certain activities by participating landowners as part of a conservation plan to restore and enhance habitat for the endangered red-cockaded woodpecker. Pursuant to that permit and this certificate, the current and future owners of the above-described property are authorized to engage in any activity on such property that may result in the incidental taking of red-cockaded woodpeckers, subject only to the terms and conditions of such permit and the cooperative agreement entered into pursuant thereto by the Service and [name of cooperator] on [date].

Name and Title of Representative
U.S. Fish and Wildlife Service

Date: _____

Senior Resident Agent
Law Enforcement
U.S. Fish and Wildlife Service

APPENDIX 3

MAP

(to be forwarded to RO shortly)

[illegible]

North Carolina Center for Geographic Information & Analysis
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